IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.160 OF 2006
IN
FAMILY COURT APPEAL NO.5 OF 2006

Mrs. Shamim Alauddin Shaikh, Age 23 years, Occupation : Housewife, Residing at C/o. Sikandar A. Mujawar Byculla Fire Station, B.J. Marg, Byculla, Mumbai – 400 008. ... Applicant

Vs.

Mr. Allauddin Gulab Shaikh, Age 27 years, Occupation : Service, Residing at, Room No.104, B-3, Anita Asmita Enclave, Phase II, Naya Nagar, Mira Road (East), Thane - 401 107. ... Respondent

Mr. M.S. Kadu for the applicant.

Mr. A.A. Bhone for the respondent.

CORAM : SMT. RANJANA DESAI & ANOOP V. MOHTA, JJ.

DATED : 14TH SEPTEMBER, 2006.

ORAL JUDGMENT :- (Per Smt. Ranjana Desai, J.)

1. The applicant is the appellant in Family Court Appeal No.5 of 2006. The applicant had filed a petition in the Family Court at Bandra being M.J. Petition No.C-149 of 2005 for maintenance under the Muslim Law. Her application came to be rejected by the Family Court by its order dated

16/12/2005. The Family Court, inter alia, came to the conclusion that the marriage was not consummated. The said order is under challenge in the instant appeal.

2. The appeal has been admitted. On 7/3/2006, the application made by the applicant-wife for interim maintenance was heard by this court. On behalf of the applicant, it was urged that the applicant' smaintenance application was, inter alia, rejected on the ground that the marriage was not consummated. It was submitted that the marriage was consummated but the applicant' spregnancy had to be terminated because she was suffering from jaundice. According to the applicant, she wanted to produce medical papers to prove that her pregnancy was terminated by operation. It was argued before this court that the applicant was prevented from producing the medical evidence regarding the operation in the course of recording of evidence before the Family Court. This court observed that though there are bare allegations to be found in the memo of appeal, no documents in that regard have been produced at the time of filing of the appeal. This court noted that in the course of argument, the applicant has sought to produce certain documents and, therefore, the question of considering those documents in the manner they are produced does not arise. This court further observed that if the applicant wants to rely upon any further evidence in appeal, she will have to make necessary application in that regard. It was further observed that in

case the applicant files an application for production of further evidence at the appellate stage nothing would prevent the applicant from filing a fresh application for grant of interim maintenance. The court further observed that till then the question of considering the various allegations of cruelty and directing the respondent to pay maintenance and, that too, when the respondent is ready and willing to take back the applicant to the matrimonial house, does not arise. This court further clarified that in case such an application is filed by the applicant, the same would be determined in accordance with the provisions of law. The interim maintenance was not granted by this court and the application was rejected.

3. It is pursuant to the above observation of this court that the present application is made. Ordinarily, we would have directed that this application should be heard at the time of final hearing of the appeal but in the peculiar facts and circumstances of the case, we are unable to do so because while denying interim maintenance to the applicant, this court has said that if the applicant wants to rely upon any further evidence, she can make necessary application and at that time, she can make fresh application for grant of interim maintenance. We have, therefore, heard the learned counsel for the parties.

4. One of the reasons which has prevailed upon the Family Court to reject

the application for maintenance of the applicant-wife is that the marriage is not consummated and under the Muslim law if the marriage is not consummated, the wife is not entitled to maintenance. The entire matter revolves around the claim of applicant-wife for maintenance.

5. The applicant' s case is that the marriage was consummated. According to her, during the trial, she tried to produce medical papers regarding her pregnancy. However, the learned judge was of the view that the same were not submitted at the time of submission of list of documents and, therefore, they cannot be allowed to be produced. She has further stated that she is a laywoman and, therefore, she could not prove consummation of marriage by adducing documentary evidence though she was in possession of the same. She has further stated that she was not represented by a lawyer and, therefore, she was not aware that she had to produce the said documents to prove that her marriage was consummated. She has, therefore, requested that she may be allowed to produce additional documentary evidence in the Family Court Appeal. To the present civil application, xerox copies of certain medical papers are annexed. Those documents, prima facie, indicate that the pregnancy of the applicant was terminated because she was suffering from jaundice. The question is whether the applicant should be permitted to lead additional evidence.

6. We have heard the learned counsel appearing for the applicant. He has reiterated the submissions made in the application. The learned counsel for the respondent has opposed the grant of this application on several counts. He submitted that there is no reflection either in the Rozanama or in the impugned judgment or in the written argument filed by the applicant which has been signed by the lawyer of the applicant that at any point of time the applicant made any effort to tender the documents in evidence and the court refused to allow her to do so. He submitted that this stand taken by the applicant at this belated stage is false. Such a prayer was never made in the trial court. The learned counsel contended that if the documents were available with the applicant, she ought to have included them in the list of documents submitted in the trial court. He submitted that the applicant is an educated person and it cannot be said that she had no knowledge of these documents or that after the exercise of due diligence, she could not have produced them. The learned counsel pointed out that even on facts, the court has come to a conclusion that the marriage was not consummated. He pointed out that the applicant has admitted in her evidence that when the applicant and the respondent went for honeymoon the applicant did not allow the respondent to touch her. He submitted that the prayer made today is clearly an afterthought. The learned counsel contended that a totally incorrect statement is made that the applicant was not represented by a lawyer. In fact, she had engaged a lawyer in the trial court. The learned counsel relied on the

judgment of the Supreme Court in ***Associated Hotels of India Ltd. v. S.B. Sardar Ranjit Singh, AIR 1968 SC 933*** in support of his submission that since in the lower court, the applicant made no attempt to prove these documents, her prayer should not be granted at this stage. He therefore, submitted that the application be rejected.

7. Order XLI, Rule 27 of the Code of Civil Procedure (for short "CPC") provides for production of additional evidence in the appellate court. It reads thus:

> **"27. Production of additional evidence in Appellate Court. -** (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if -
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> (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
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> [(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]
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> (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,
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> the Appellate Court may allow such evidence or

document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

Order XLI, Rule 28 of the CPC provides for mode of taking additional evidence. It reads thus :

> **"28. Mode of taking additional evidence. -** Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court."

Order XLI Rule 29 of the CPC provides for points to be defined and recorded by the appellate court. It reads thus :

> **"29. Points to be defined and recorded. -** Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified."

8. These provisions indicate that in a given case, the Appellate Court, if it is satisfied that the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or that the party

seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence be produced at the time when the decree appealed against was passed or the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause the Appellate Court may either take such evidence or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and send it when taken to the Appellate Court.

9. As we have already noted in this case, the only issue involved is the right of the applicant-wife to get maintenance from her husband. The xerox copies of the documents, which the applicant wants to rely upon, prima facie, indicate that the applicant was pregnant and her pregnancy was terminated because of jaundice. On the consummation of marriage, the trial court has observed as under :

> "I would like to state here that the petitioner has taken oath in the open court by keeping her hand on the quran that the marriage has been consummated. On the other hand the respondent in the open court has stated on oath by keeping his hand on quran that the marriage is not consummated. It is word against word. The petitioner is nowhere stated as to when

> the marriage has been consummated, either in pleadings or evidence, if one goes through the evidence, in all probabilities it appears that the petitioner has not allowed to have sexual intercourse with her."

Therefore, while coming to the conclusion that the marriage was not consummated, the trial court has also relied on probabilities. We, therefore, feel that this case is covered by the words "any other substantial cause" found in Order XL Rule 27(1)(b) of the CPC. In our opinion, therefore, in the peculiar facts and circumstances of the case, the matter needs to be remanded to the trial court with a direction to the trial judge to permit the applicant to adduce additional evidence.

10. We do find some substance in the submission of the learned counsel for the respondent that there is nothing to indicate that any effort was made to produce these documents on record. It also appears that at some stage the applicant had the benefit of the services of a lawyer. However, we cannot lose sight of the fact that, we are dealing with maintenance of a woman and interest of justice require that this court should allow the parties to lead evidence which can throw more light on the main issue involved in the matter rather than adopting a hyper-technical approach. That, however, must be done legally. At this stage, we may refer to the judgment of the Supreme Court in ***Arjun Singh v. Kartar Singh & Others, AIR (38) 1951 SC 193***

whereby dealing with the provisions of Order XLI, Rule 27 of the CPC, the Supreme Court observed as under:

> "The discretion given to the appellate Ct. by O.41, R.27 to receive & admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in that rule. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion, & the additional evidence so brought on the record will have to be ignored &* the case decided as if it is non-existent."

11. We may also refer to the judgment of the Supreme Court in ***The Land Acquisition Officer, City Improvement Trust Board, Bangalore, v. H. Narayanaiah, etc. etc., AIR 1976 SC 2403,*** where the Supreme Court was again dealing with Order XLI, Rule 27 of the CPC. The Supreme Court observed that if it is found that additional evidence is necessary to be admitted, an opportunity has to be given to the other side to rebut inference arising from its existence by leading other evidence.

12. The entire exercise will have to be, therefore, done having regard to the aforesaid authoritative pronouncements of the Supreme Court. It is true that in the ***Associated Hotels of India Ltd.s' case (supra)***, which is cited by the learned counsel for the respondent, the Supreme Court has observed that

where genuineness of the document is disputed by the party and the party seeking to lead additional evidence made no attempt to prove these documents in the trial court, the application for additional evidence should not be granted. That was a case which arose out of tenancy proceedings. In our opinion, the ratio of the said judgment is not attracted to the facts of this case. We cannot forget that we are dealing with matrimonial proceedings and, therefore, in our opinion, in the peculiar facts of this case and in view of the earlier order of this court, a liberal view needs to be taken. In the circumstances, we direct the Family Court No.7 at Bandra to permit the applicant-wife to adduce additional evidence in accordance with law. The additional evidence will be confined to the medical evidence pertaining to pregnancy and medical termination of pregnancy of the applicant-wife.

13. Needless to say that the respondent-husband will have an opportunity to rebut any inference arising from the evidence led by the applicant by leading other evidence confined to pregnancy and medical termination of pregnancy of the applicant-wife. It is open to both parties to cross-examine each other' switnesses. The Family Court shall complete the entire exercise and send the evidence to this court within a period of three months from 18/10/2006. The parties will appear before the Family Court on 18/10/2006 for fixing the date of hearing.

14. Civil application is disposed of in the aforestated terms.

[SMT. RANJANA DESAI, J.]

[ANOOP V. MOHTA, J.]